

Episode 151: Summary

Episode name: The First Nations Child Removal Class Action: What You Need to Know

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What area(s) of law does this episode consider?

The First Nations Child Removal class action.

Why is this topic relevant?

Recently, a landmark class action was filed in the Federal Court, alleging various Departments of Child Protection in Australia have engaged in unlawful racial discrimination which has resulted in the unjust removal of First Nations children and the failure to reunify First Nations children with their families following removal.

This action rehashes the painful legacy of the Stolen Generation, with powerful parallels being drawn between historical child removals and today's child protection practices. This landmark class action has the potential to have profound implications on Australia's child protection policies and broader cultural accountability and awareness.

What legislation is considered in this episode?

[Racial Discrimination Act 1975 \(Cth\)](#) (**Racial Discrimination Act**)

[Federal Court Act 1976 \(Cth\)](#)

[Children and Young Persons \(Care and Protection\) Act 1998 \(NSW\)](#)

What cases are considered in this episode?

[Gerhardy v Brown \[1985\] HCA 11](#)

- The case concerned a charge against the defendant under section 19(1) of the *Pitjantjatjara Land Rights Act 1981* (SA) for entering Pitjantjatjara lands without permission, raising questions of constitutional validity in relation to the *Racial Discrimination Act*. The Supreme Court of South Australia found that section 19 of the *Pitjantjatjara Land Rights Act 1981* (SA) was inconsistent with section 9 of the *Racial Discrimination Act*, as it imposed a racial restriction on freedom of movement, rendering it invalid under section 109 of the Constitution.

[Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission \[1998\] FCA 1650](#)

- The meaning of “based on” in section 9(1) of the *Racial Discrimination Act* could be differentiated from other terms used in anti-discrimination legislation, such as “by reason of” or “on the ground of,” which had been interpreted elsewhere as requiring a causal connection, instead meaning “by reference to.”

[Wotton v Queensland \(No 5\) \[2016\] FCA 1457](#)

What are the main points?

- In November 2004 Mulrunji Doomadgee died in police custody. Mulrunji's death triggered civil unrest and a response from the Queensland Police Service (QPS). Justice Mortimer found that QPS' response to Mulrunji's death contravened the *Racial Discrimination Act* in a number of ways.
- Shine Lawyers have filed a class action lawsuit in WA and NSW against their respective Departments of Communities, alleging unlawful racial discrimination in the way they investigate First Nations families, remove children from their families, place them in out-of-home care, and fail to reunify them.
- The class action also addresses the lack of funding provided to Aboriginal Community Controlled Organisations to assist First Nations families in navigating the child protection system.
- The Aboriginal Child Placement Principle prioritises placing First Nations children with Aboriginal relatives or community members to maintain their cultural connections. Each jurisdiction has nuances in their implementation, with New South Wales consulting with extended family or kinship groups if a suitable person in the hierarchy cannot be found, and Western Australia considering non-Aboriginal caregivers who are culturally responsive as a last resort option.
- The class action alleges the Departments have breached section 9 of the *Racial Discrimination Act*, alleging both direct and indirect discrimination.
- Direct discrimination focuses on treating someone differently based on race, while indirect discrimination occurs when seemingly neutral rules practically result in disadvantages for certain groups.
- The class members have been organised into three eligible categories:
 - First Nations children who were removed from their parents, guardians or carers;
 - First Nations parents who were investigated, or had children removed, following which the Department failed to reunify the children according to the Child Placement Principles; and
 - Willing carers who were nominated by a family member or applied to the Department to care for a child who had been removed, who were rejected or not assessed by the Department.
- The systemic issues within child protection services that disproportionately affect Aboriginal families are the department's intervention conduct, the use of

risk assessment tools that have discriminatory impacts, and the standards imposed on First Nations parents that may clash with their cultural practices.

- The action argues that the overrepresentation of Aboriginal children in out-of-home care highlights the urgent need for addressing these disparities and promoting culturally sensitive approaches in child welfare systems.
- Applicants are not motivated by the potential monetary amount awarded as compensation, but rather the need for change and addressing the impact of historical injustices like the stolen generation.
- The class action aims to bring about reform in the system, secure compensation for affected families, and hold the department accountable to the Aboriginal Child Placement Principles, to ultimately minimise harm to Aboriginal families.

What are the practical takeaways?

- When trying to determine your future path in law, you should first look to identify your strengths and passions.
- There are many opportunities to contribute to social justice in the law such as government, policy reform, research, academia, community legal centres, or litigation like class actions.
- Understand the long-term nature of change and reform in these spaces. Celebrate small victories, and recognise that even small efforts can contribute to larger movements for equality and justice over time.

Show notes

[Audit Office of NSW \(2024\), 'Safeguarding the rights of Aboriginal children in the child protection system'](#)

[Australian Human Rights Commission \(1997\), 'Bringing Them Home Report'](#)

[Davis, M. \(2019\) 'Family is Culture: Independent Review of Aboriginal Children and Young People in OOH in NSW'](#)